



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: SCIENTECH, Inc.

File: B-277805.2

Date: January 20, 1998

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DIGEST

Agency's exclusion of the protester's proposal from the competitive range was unreasonable where: (1) the protester's proposal was considered technically acceptable overall and on each evaluation factor, and it had no perceived deficiencies; (2) the past performance/customer satisfaction evaluation did not consider the fact that the protester and its proposed subcontractor were incumbent contractors, performing the same or very similar work for the same contracting activity and the protester had received excellent performance ratings; and (3) the agency did not consider price or cost in determining the competitive range.

DECISION

SCIENTECH, Inc., protests the Department of Energy's (DOE) decision to exclude it from the competitive range established under request for proposals (RFP) No. DE-RP07-97ID13485 for advisory and assistance support services in support of DOE's Idaho Operations Office (DOE-ID). The protester contends that DOE's evaluation of proposals was unreasonable and that its proposal was improperly excluded from the competitive range.

We sustain the protest because DOE, in making its competitive range determination, unreasonably failed to consider cost or price as well as significant relevant past performance information that was highlighted in SCIENTECH's proposal.

Issued on March 31, 1997, the RFP contemplated award of three to five indefinite delivery, indefinite quantity, cost reimbursement contracts to replace several

expiring advisory and assistance support services contracts.¹ Each contract would be for a period of 5 years, would include cost-plus-fixed-fee and cost-plus-incentive-fee pricing provisions, and would have a ceiling price of \$25 million. The work would be performed in response to task orders issued by the contracting officer. The RFP required offers for services in two general areas--engineering/technical services and management/professional services. The RFP required offers to include ceiling rates for the proposed fees as well as ceilings for burdened labor rates for a large number of labor categories that might be used in performing the work.

Under the RFP's evaluation scheme, contracts were to be awarded to those offerors whose proposals were determined to be most advantageous after evaluation of proposals on performance approach and cost/rate criteria. The performance approach criteria and their relative weights (in percentage terms) were: management approach (55 percent), past performance/experience (25 percent); and subcontracting approach (20 percent). The RFP stated that performance approach criteria would be given point scores and assigned adjectival ratings but the cost/rate criterion would not be point scored or adjectivally rated; instead, cost/rate proposals were to be evaluated for reasonableness and appropriateness of proposed rates. The RFP also stated that the performance approach criteria were considered significantly more important than the cost/rate criterion, but provided that, if the proposed rates of a higher-scored proposal were higher than other proposals being considered for award, the government would determine if the advantages of the higher-scored proposal were worth the additional rate costs.

Twenty proposals were received by the May 28, 1997, due date for receipt of initial proposals. The source evaluation panel (SEP) evaluated initial proposals; overall technical scores ranged from a low of just [deleted] percent to a high of [deleted] percent. The SEP determined that 17 of the 20 initial proposals were acceptable. SCIENTECH's proposal was rated as acceptable overall, as well as on each of the three technical evaluation criteria, and was ranked [deleted] with an overall score of [deleted] percent.² The SEP was briefed by the DOE financial advisor, who evaluated cost/rate proposals for reasonableness, but did not compare or rank the offerors' proposed prices or labor rates. The SEP decided that there was a "natural, logical scoring break" between the seventh [deleted] and eighth [deleted] highest-rated offers and that offers rated at less than [deleted] did not have a reasonable chance for selection. Accordingly, the SEP, with the concurrence of the

¹The agency reports that the procurement was conducted to replace five expiring incumbent contracts. The RFP, however, listed seven incumbent contracts, including a contract between DOE and SCIENTECH (contract No. DE-AM07-92ID13143).

²In accord with the agency's source selection plan, ratings in the [deleted] percent range were considered satisfactory.

source selection official, included only the seven top-rated proposals in the competitive range and excluded SCIENTECH's lower-rated proposal. By letter of August 11, the contracting officer notified SCIENTECH of this determination.

After discussions were held with the competitive range offerors and best and final offers (BAFO) received and evaluated, by letter of September 26, 1997, DOE notified SCIENTECH that it had awarded four contracts pursuant to the RFP.³ Shortly thereafter, on October 7, DOE debriefed SCIENTECH. This protest was filed within 5 days of the debriefing.

Basically, the protester contends that DOE's evaluation of its proposal was unreasonable, and, therefore, the competitive range determination, which was based upon that evaluation, was flawed. The protester contends that DOE's evaluation of SCIENTECH's and its proposed subcontractors' past performance and experience was unreasonable because DOE selected for evaluation only 4 of the 10 references that SCIENTECH included in its proposal. In this regard, SCIENTECH asserts that DOE unreasonably failed to consider SCIENTECH's performance as an incumbent contractor for DOE-ID for the exact same work that is being procured here and instead selected contracts that were smaller and less relevant to the present requirement than its incumbent contract. SCIENTECH also asserts that DOE unreasonably selected for evaluation a reference for only one of SCIENTECH's proposed subcontractors--a firm that had relatively little experience working for DOE-ID--and did not evaluate any of the references submitted for SCIENTECH's other proposed subcontractors, all of which have extensive relevant experience with DOE-ID. The protester also asserts that DOE failed to consider the relative proposed prices of the offers in making its competitive range determination. In this connection, SCIENTECH contends that, if DOE had considered relative proposed prices, then DOE could not reasonably have eliminated SCIENTECH's proposal, which included labor rates that were substantially lower than those of some of the competitive range offers, from the competitive range.

³Contracts were awarded to Ecology & Environmental, Inc.; Global Technologies, Inc.; Los Alamos Technical Associates, Inc.; and Systematic Management Services, Inc. Performance under all four contracts has been stayed pending our resolution of this protest.

Our examination of an agency's decision to exclude a proposal from the competitive range begins with the agency's evaluation of proposals. Techniarts Eng'g, B-271509, July 1, 1996, 96-2 CPD ¶ 1 at 3. In reviewing an agency's technical evaluation, we will not reevaluate the proposals but will examine the record of the agency's evaluation to ensure that it was reasonable and in accord with stated evaluation criteria, and not in violation of procurement laws and regulations. Id. The competitive range consists of all proposals that have a reasonable chance of being selected for award. See Federal Acquisition Regulation (FAR) § 15.609(a) (June 1997).

The past performance/experience criterion was worth 25 percent of the total evaluation. Within past performance/experience, the RFP listed two subcriteria: relevant past performance (worth [deleted] evaluation points or [deleted] percent) and customer satisfaction (worth [deleted] evaluation points or [deleted] percent). For evaluation purposes, the RFP allowed offerors to submit no more than 10 references for the offeror and its subcontractors and to include specified information concerning current contracts and contracts completed in the last 3 years.⁴ In evaluating proposals on the relevant past performance subcriterion, DOE reports that it evaluated all references contained in the proposal. However, in evaluating proposals on the customer satisfaction subcriterion, DOE sent questionnaires to some, but not all, of the references. In most cases, DOE evaluated responses (*i.e.*, completed questionnaires) from cognizant contracting personnel concerning three previous contracts performed by the offeror and just one response concerning a previous contract performed by a proposed teaming subcontractor.

Examination of SCIENTECH's proposal shows that SCIENTECH's incumbent DOE-ID contract was the focal point of the past performance/experience section of SCIENTECH's technical proposal. The proposal highlighted the incumbent contract in several ways. For example, whenever the proposal listed previous projects, the incumbent contract was listed first. SCIENTECH's proposal also included one entire page that consisted of a table dedicated exclusively to showing that the work performed by SCIENTECH under its incumbent DOE-ID contract encompassed the work required under the present RFP's statement of work. Most importantly, when SCIENTECH described its previous experience, the description of the incumbent contract was by far the most comprehensive, taking up a full 15 pages of the proposal, and the description began with the following statement:

⁴As used in this RFP, a reference actually included a brief description of the contractor's or its proposed teaming subcontractor's prior contract (including, among other things, the dollar value, the type of work performed, and performance difficulties), as well as points of contact to whom DOE could send customer satisfaction questionnaires.

This project is **the key project that demonstrates SCIENTECH's capabilities and experience** for DOE's Idaho Operations Office. SCIENTECH will build on its experience and successful performance of this project to provide a seamless continuation of superior quality, cost-effective support and services to DOE-ID. [Emphasis added.]

Thus, it should have been clear to DOE that SCIENTECH was relying heavily on its work as an incumbent DOE-ID contractor as the primary source to be used in the evaluation of its past performance.

DOE has provided no detailed explanation for its failure to solicit and evaluate a customer satisfaction questionnaire regarding SCIENTECH's incumbent contract. In its report on the protest, DOE offered only a general explanation stating that some references provided by offerors created a potential for unreliable evaluation of past performance and some were older contracts or were less relevant. DOE also argued that there is no requirement that all references listed in a proposal be checked by the agency.

While there is no legal requirement that all past performance references be included in a valid review of past performance, some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114 at 5-6. In our opinion, the agency's failure to evaluate SCIENTECH's work as incumbent in the current case was patently unfair to the protester. Not only did SCIENTECH emphasize the importance of its experience as incumbent in its proposal, but our review of the statements of work for the incumbent contract and the current RFP confirms that the work required under the new contract is strikingly similar to the work required under the old contract. Apparently, DOE also believed that SCIENTECH's incumbent contract and the current RFP contained very similar statements of work, because the RFP specifically listed SCIENTECH's incumbent DOE-ID contract as "a representative sample of the broad scope of work included in the incumbent contracts." Additionally, the record shows that SCIENTECH's incumbent contract and the new contracts are indefinite quantity contracts, the incumbent contract has incurred roughly \$15 million in work so far while the new contracts are capped at \$25 million, and SCIENTECH is still performing work under the incumbent contract. It is difficult to imagine a prior contract experience that is more relevant to the current procurement in terms of the same contracting activity, similarity of the scope of work, similarity of contract size and type, and recent performance. Id. at 4-6. Accordingly, we think it was unreasonable for DOE not to evaluate SCIENTECH's incumbent contract when evaluating the customer satisfaction subcriterion.

SCIENTECH also contends that DOE unreasonably selected for customer satisfaction evaluation the only subcontractor listed in SCIENTECH's proposal that

had relatively little experience with DOE-ID instead of one of its other proposed subcontractors, all of which have had extensive experience with DOE-ID. Since DOE's report contained only a general statement about how some references were considered more relevant than others and did not specifically respond to the protest allegation, we do not know how or why the SEP selected the one subcontractor reference for evaluation. We note, however, that one of SCIENTECH's proposed subcontractors, Halliburton NUS Corporation, was an incumbent contractor performing this same work under its contract--valued at roughly \$7 million--with DOE-ID. Notwithstanding the fact that SCIENTECH's proposal listed this subcontractor as one of its references and that the RFP also listed this contractor's incumbent contract as a representative sample of the scope of work performed by the incumbent contractors, the SEP chose not to evaluate this subcontractor reference. Because this reference was an incumbent contractor providing technical and management support services to DOE-ID under a contract that was considerably more than RFP's \$2 million threshold for purposes of inclusion in the evaluation, we think that DOE also should have evaluated the clearly relevant contract. Id.

SCIENTECH states that it has consistently received "excellent" ratings from DOE-ID contracting personnel for its work under the incumbent contract and has submitted a contractor performance report showing an excellent overall rating for the 1-year period ending on April 30, 1997. DOE has not refuted SCIENTECH's statement or provided any evidence to the contrary. Therefore, we think it likely that SCIENTECH would have received very good or even excellent ratings from cognizant contracting personnel if a customer satisfaction questionnaire were solicited and evaluated.

Additionally, SCIENTECH's initial proposal received an overall acceptable rating of [deleted] percent while the lowest-rated competitive range proposal received an acceptable rating of [deleted] percent. If SCIENTECH's proposal were to receive a perfect score on customer satisfaction, SCIENTECH's overall rating would increase to [deleted] percent, just [deleted] percent less than the lowest-rated competitive range proposal, and would be ranked {deleted} out of 20 proposals, instead of [deleted] as originally ranked. SCIENTECH's proposal did not have to displace the seventh ranked offer in the evaluation ranking in order to be included in the competitive range; instead, the competitive range, which was established based on a break or gap in scores, could have been determined to include SCIENTECH's proposal, whose score, as adjusted, would have fallen within what had been a gap. In view of the fact that SCIENTECH's proposal was rated as acceptable on every evaluation factor, and because the record shows that SCIENTECH's proposal had no deficiencies and received the same overall "acceptable" rating as the proposals that were included in the competitive range, we have no reason to believe that the SEP would not have included SCIENTECH's [deleted]-ranked proposal in the competitive range. This is especially so since the RFP contemplated that as many as five contracts would be awarded.

The likelihood that SCIENTECH would have been included in the competitive range is strengthened by the fact that the SEP failed to consider the offers' relative costs when making the competitive range determination.⁵ While a technically acceptable proposal may be eliminated where it does not have a reasonable chance for award, Techniarts Eng'g, supra, at 3-4, FAR § 15.609(a) requires that the competitive range be determined on the basis of cost or price as well as other factors that were stated in the solicitation and that, when there is doubt as to whether a proposal has a reasonable chance of being selected for award, the proposal should be included in the competitive range. Cost or price must be considered as a factor; it is improper to exclude an offeror from the competitive range solely on the basis of technical considerations, unless the proposal is technically unacceptable. S&M Property Management, B-243051, June 28, 1991, 91-1 CPD ¶ 615 at 4; HCA Gov't Servs., Inc., B-224434, Nov. 25, 1986, 86-2 CPD ¶ 611 at 3-4.

The failure to consider cost in competitive range and award decisions is improper. Agencies must consider cost to the government in evaluating competing proposals. 41 U.S.C. § 253a(b)(1) (1994). Agencies have considerable discretion in determining the appropriate method for taking cost into account; they do not have discretion, however, not to consider cost at all, as happened here. Health Servs. Int'l, Inc.; Apex Envtl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 4.

The record shows that cost/rate proposals were evaluated for reasonableness, but no comparison of the offers' costs was made as part of the competitive range determination. This was apparently because the SEP was unable to develop most probable cost estimates for the competing proposals, since, as the SEP noted, the RFP did not include what the SEP referred to as "artificial methods" such as sample tasks or estimates of the quantities of labor hours to be ordered under each labor category.

While we understand that it is somewhat artificial to use hypothetical sample tasks in a solicitation for an indefinite delivery, indefinite quantity contract, where the actual work will be competed through task orders, sample tasks permit the government to assess the probable cost of competing offerors in light of both the offerors' differing technical approaches and their labor rates and fees. As an alternative, an agency may simply multiply offerors' proposed labor rates by estimated quantities of labor hours for each labor category (such estimates may be

⁵We note that most of the other perceived weaknesses in the protester's proposal were informational in nature and could have easily been remedied through discussions. This applies to the weaknesses upon which the protest was based, namely, that: [deleted]. We thus find unreasonable the agency's conclusions that the weaknesses the SEP perceived in SCIENTECH's proposal were so extensive that the proposal would have to be rewritten or that discussions about those weaknesses would necessarily lead to technical leveling.

based, for example, on the agency's recent experience); that method, while simpler, does not take into account differences in offerors' technical approaches. See id.

DOE argues that SCIENTECH suffered no competitive prejudice from the agency's failure to consider cost in the competitive range determination. In support of this argument, DOE points to a summary document, created in response to the protest, which compares SCIENTECH's labor rates and fee ceiling to the labor rates and fee ceiling of the seven competitive range proposals. DOE contends that this comparison shows that SCIENTECH's proposed labor rates and fee ceiling are at best comparable to those contained in the competitive range offers and that in many cases the competitive range offers' labor rates and fee ceilings are lower than SCIENTECH's. In light of this, and since SCIENTECH's overall technical rating was lower than those of the competitive range offers, the agency contends that SCIENTECH's proposal would not have been included in the competitive range even if cost had been considered.

The agency's summary document, which is limited to comparing labor rates and fees, is not helpful, since it fails to take into account the different quantities of the various labor categories that the agency expects to use. See Temps & Co., 65 Comp. Gen. 640, 642 (1986), 86-1 CPD ¶ 535 at 4. Moreover, the agency's labor rate/fee ceiling summary supports our conclusion that SCIENTECH did in fact suffer prejudice from the agency's failure to take cost or price into account in the competitive range determination. Specifically, DOE's summary shows that the competitive range offers' proposed fee ceilings ranged from [deleted] percent, while SCIENTECH proposed a sliding fee scale ranging from [deleted] percent depending on the complexity of the work. Thus, it appears that SCIENTECH's fee ceiling was low relative to the range of fee ceilings in the competitive range offers. Furthermore, while DOE points out that SCIENTECH's average labor rates are not the lowest for any particular labor category, the agency's summary reveals that, SCIENTECH's labor rates are lower than the [deleted]-ranked competitive range proposal's rates in the great majority of labor categories (19 of the 24 categories represented). While these comparisons cannot substitute for an adequate cost analysis, they undercut the agency's contention that the lack of such an analysis did not prejudice the protester.

For the reasons set forth above, we sustain the protest. Since DOE has suspended performance under the contracts, we recommend that DOE include SCIENTECH's proposal in the competitive range, hold discussions with SCIENTECH concerning the various weaknesses perceived by the SEP in SCIENTECH's proposal, and solicit a BAFO from SCIENTECH. After SCIENTECH's BAFO is evaluated, DOE should

make a new source selection decision consistent with this decision.⁶ Because we are sustaining the protest, it is not necessary for us to address SCIENTECH's protest grounds concerning the SEP's downgrading of SCIENTECH's proposal, as those issues can be addressed by the agency during discussions. We also recommend that SCIENTECH be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). SCIENTECH should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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⁶Instead of including the protester's proposal in the competitive range and soliciting a BAFO from that firm, the agency may decide, in the alternative, to amend the RFP to add an explanation of the cost evaluation and then to solicit revised proposals from all offerors. However, since no offeror has contested the lack of such an explanation in the solicitation, the agency may elect to proceed with its cost analysis based on its internal calculations of the estimated quantities of labor hours to be ordered.